Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-255

MELVILLE T. BARR,

Petitioner,

v.

MICHAEL J. GIACOPELLI and STEPHEN DEMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

MELVILLE T. BARR,

Petitioner,

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MICHAEL J. GIACOPELLI and STEPHEN DEMAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 18, 1979.

Opinions Below

The decision of the Court of Appeals denying the Petition for a Writ of Mandamus, dated March 22, 1979 is not reported. It is printed in the Appendix to this Petition at page 3a.

The opinion of the District Court, filed August 15, 1978 denying Petitioner's motion for transfer pursuant to 28 U.S.C. §1404 and the opinion of the District Court denying Petitioner's motion to amend the Order of August 15, 1978, filed September 20, 1978, are not reported. They are printed in the Appendix to this Petition at pages 4a-10a.

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[1] Hereinafter referred to as Petitioner or Barr.

Jurisdiction

The decision of the Court of Appeals denying the Petition for a Writ of Mandamus was entered on March 22, 1979. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by Orders of the Court of Appeals entered on May 18, 1979.[2] The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner sought the extraordinary relief of mandamus because of the refusal of the trial court to transfer this case to the Middle District of Florida despite the fact that the Middle District of Florida is where: (1) the accident occurred at a racetrack owned by the City of Orlando; (2) all of the eyewitnesses reside; (3) all of the employees of plaintiff and defendant with knowledge relevant to this action reside; (4) all of the employees of the track who have knowledge as to the customs and practices at the track reside; (5) all of the employees of the company which sold, maintained and repaired the allegedly defective equipment reside; (6) all of the physical evidence and documents concerning the accident are located; (7) the federal court has full and complete subpoena power over the testimony and evidence in the action; (8) the horses in question were kept and trained; and (9) the suit could have been brought.[3]

The United States Court of Appeals for the Second Circuit denied the Petition for a Writ of Mandamus despite the fact that all of the statutory and judicially-created

[2] See Appendix at pages 1a-2a.

[3] Service was effected upon both of the defendants below in Orlando, Florida and complete diversity jurisdiction exists in Florida.

criteria for making a 28 U.S.C. §1404 decision favored transfer and no criteria favored a denial of transfer. Under these circumstances, the following questions are presented for review:

(1) Can a Court of Appeals refuse to review a denial of a transfer motion even though all of the statutory and judicially-created criteria favor transfer?

(2) In light of the uncertainty amongst the Circuits with regard to the standard of review of transfer motions, what is the proper standard for review of the denial of transfer motions?

(3) Is not the decision of the trial court such a clear and manifest abuse of discretion so as to require review and reversal by the Court of Appeals?

(4) Does the decision of the Court of Appeals herein signal an abandonment of the writ of mandamus as a vehicle for reviewing denial of transfer motions?

Statutory Provisions Involved

28 U.S.C. §1404(a)

§1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. §1651(a)

§1651. Writs

(a) The Supreme Court and all courts by Act of Congress may issue all writs necessary or appropriate in

aid of their respective jurisdictions and agreeable to the usages and principles of law.

Statement of the Case

A. The Facts

This action arises from the collision of two race horses on March 20, 1978 at the Ben White Raceway in Orlando, Florida. Both of the horses were destroyed as a result of injuries sustained in the collision. Respondents (plaintiffs in the district court) herein claim to be the owners of the horse "Calumet", one of the horses involved in the accident and seek damages in the amount of $100,000 for the death of their horse. Respondents' action, sounding in negligence, alleges that Melville T. Barr d/b/a Barr M. Stable is the owner of the horse "Bajan", which was the other horse involved in the accident and that he failed properly to maintain "Bajan's" equipment and permitted an inexperienced groom to drive the horse.

The accident which gives rise to this action occurred in Orlando, Florida at the Ben White Raceway which is owned and operated by the City of Orlando. All of the eyewitnesses to the accident: Mr. Elmer Gilliland, Mrs. Herman Holland, Mr. James W. Baskin, as well as the trainers and drivers of both horses, reside in Florida either permanently or for at least one-half of every year. None reside in New York. The identity of the eyewitnesses and the substance of their testimony was presented to the district court in the transfer motion. The employees of Stockman Harness Supply Co., which sold, maintained and repaired the allegedly defective equipment, are all permanent residents of Florida. All documents and physical evidence relating to the accident are located in Florida. Petitioner (defendant in the trial court), a Canadian citizen, had a tempo-

rary residence in Florida for approximately half of each year. All of the evidence and testimony in this case is subject to the subpoena power of the District Court for the Middle District of Florida and none of the evidence or testimony is subject to the subpoena power of the District Court for the Eastern District of New York. The action could have been brought in the Middle District of Florida pursuant to 28 U.S.C. §1391(a) since it is the place where the petitioner resides and where the claim arose.

The only potential witnesses who do not reside in Florida are respondents, only one of whom lives in New York. Since respondents allege in the Complaint that they turned their horse over to Samuel Lewis, a Florida resident, for training in Florida, they have no personal knowledge of the facts or circumstances surrounding this accident.

B. Proceedings in the Courts Below

The action was commenced on April 6, 1978. The Answer of the named defendants Melville T. Barr and Shayne Barr was filed on May 8, 1978.

On July 7, 1978, defendants moved the District Court for an Order dismissing the Complaint due to lack of personal jurisdiction over Melville T. Barr and Shayne Barr. In the alternative, defendants moved for transfer to the action to the District Court for the Middle District of Florida pursuant to 28 U.S.C. §1404(a).

In its Memorandum and Order dated August 14, 1978 and filed August 15, 1978, the District Court denied the motion to transfer, dismissed the action against Shayne Barr and held that the Court had personal jurisdiction over Melville T. Barr. [A copy of this Memorandum and Order is in the Appendix hereto at 4a-7a]

The District Court based its denial of the transfer motion on the fact that New York is closer to Canada (the country of petitioner's citizenship) than is Florida. The District Court also presumed that plaintiffs (one of whom is a New York resident) would want to testify as to the value of the horse. The District Court did not take cognizance of the fact that petitioner was a resident of Florida for approximately half of every year. Further, the court had no evidence or even a suggestion that, in fact, plaintiffs intended to testify or were competent to testify as to the value of the horse.

On August 25, 1978, Melville T. Barr moved for Reargument or Amendment of the Court's August 15, 1978 Order. By amended Memorandum and Order, dated September 19, 1978 and filed September 20, 1978, the District Court modified its basis for finding personal jurisdiction over defendant Melville T. Barr, refused to transfer the case to the Middle District of Florida pursuant to 28 U.S.C. §1404(a) and declined to certify the question for appeal. [A copy of this Amended Memorandum and Order is in the Appendix at pages 8a-10a]

In the motion for reargument, petitioner contended that petitioner's residence in Florida, coupled with the fact that all liability witnesses, evidence, records and physical property were present in Florida, required transfer. In denying the motion for reargument, the trial court, without elaboration, concluded that "the facts of this case do not warrant a transfer".

A Petition for Mandamus was timely filed on October 20, 1978. On February 6, 1979, the Court of Appeals for the Second Circuit granted a stay and ordered the respondents herein to file a brief in opposition. On March 22, 1979, the Court of Appeals entered an Order denying the Petition

without opinion. [A copy of this Order is contained in the Appendix at p. 3a]

A Petition for Rehearing containing a Suggestion for Rehearing *En Banc* was timely filed. On May 18, 1979, by separate Orders, the Court of Appeals denied the Petition for Rehearing and refused a Rehearing *En Banc*. [These Orders are printed in the Appendix at pages 1a and 2a]

REASONS FOR GRANTING THE WRIT

1. The refusal of the Court of Appeals to exercise its discretion to review the decision of the district court herein is, in effect, a denial by the Court of Appeals of the use of mandamus with regard to transfer motions. While the Court has never explicitly held that mandamus should be used to review transfer motions, it has impliedly done so,[4] and, in an analogous situation, has stated under what circumstances mandamus review is appropriate.

In *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964), the Court reviewed a transfer of a criminal action pursuant to FED. R. CRIM. P. 21(b). With regard to the use of mandamus by the Court of Appeals in that case, the Court said:

> The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are "reserved for really extraordinary causes," Ex parte Fahey, 332 US 258, 260, 91 L ed

[4] The Court has granted petitions for certiorari to review mandamus determinations of Courts of Appeal regarding transfer motions and has never held mandamus to be inapplicable. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960); *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 n.1 (1964). See also *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955) and *Ex parte Collett*, 337 U.S. 55 (1948).

> 2041, 2043, 67 S Ct. 1558 (1947), and then "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so". Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 87 L ed. 1185, 1190, 63 S Ct 938 (1943).

376 U.S. at 245. In *Platt*, the Court ultimately remanded the case to the district court to reconsider its transfer decision because its initial decision considered an improper factor.

As will be demonstrated herein, the district court's determination in the case at bar relied upon improper factors and so glaringly failed properly to consider the correct statutory criteria that it refused "to exercise its authority when it [was] its duty to do so". Therefore, the refusal of the Court of Appeals to review this action indicates that the Court of Appeals is abandoning the use of mandamus in consideration of transfer decisions or so limiting its use as to deny review in any case except where the district court has unlawfully acted.[5] It is submitted that such a standard for the use of mandamus effectively denied redress in a situation where the district court refused "to exercise its authority when it is its duty to do so", and, therefore, is contrary to the holding of the Court in *Platt*.

a. *The district court relied upon improper bases.*

In denying the motion of petitioner-defendant for a transfer, the district court held:

[5] The Court of Appeals may have adopted Judge Friendly's long held position that transfer decision are not "extraordinary causes" and that mandamus will not lie unless the district court has acted in a way that it has *no power* to act. See *A. Olinick & Sons* v. *Dempster Brothers, Inc.*, 365 T.2d 439 at 445-48 (2d Cir. 1966). *American Flyers Airline Corp.* v. *Farrell*, 385 F.2d 936 (2d Cir. 1967).

> Defendants have also moved alternatively to have the case transferred to the middle district of Florida pursuant to 28 U.S.C. §1404(a). It is true that the alleged accident happened in Orlando, Florida, and some witnesses resident there may testify. However, New York is closer to Canada, the residence of Melville and Shayne Barr, than is Orlando, Florida. Moreover, presumably important proof as to the value of plaintiff's horse will be required. Witnesses who can testify to this presumably include the plaintiffs. People who are in the business of racing horses must of necessity be peripatetic, and it hardly seems a greater burden to defendants to come to New York than to come to Florida. Under the circumstances plaintiffs' choice of forum will not be disturbed. The motion to transfer is denied. So ordered.

Thus, the factors cited by the district court below are: (1) that New York is closer to Canada (the citizenship/residence of the petitioner) than is Florida; and (2) that plaintiffs (respondents herein) only one of whom lives in New York, will "presumably" wish to testify as to damages. Neither of these factors are among those contained in the statute or in the court decisions which have defined the statutory criteria. In fact, in the decision of the district court below (see Appendix at pages 4a-10a) there is no mention of any of the statutory or judicially recognized factors.

As to the first factor relied upon by the court below, the court erred in stating that Canada is the residence of the petitioner and, therefore, that New York is a more convenient forum than Florida. Petitioner is a Canadian citizen, but he also is a temporary resident of Florida for approximately half of each year. Thus, clearly, Florida,

as a factual matter, is more convenient to the defendant than is New York.

No court has ever cited the defendant's citizenship/residence as a controlling factor on a transfer motion.[6] Thus, not only is this factor factually incorrect, but, in itself, the citizenship/residence of a party is not a proper basis for determining a transfer motion.

The reliance of the district court below on the possible testimony of respondents as to damages is erroneous both as a matter of fact and law. As a matter of fact, respondents did not state to the district court below that they would testify. Rather, the district court merely "presumed" that they would. It is clear that before the court should take into account the residence of a witness, his testimony must be more than a mere possibility. *Flintkote Co.* v. *Allis-Chalmers Corp.*, 73 F.R.D. 463, 466 (S.D.N.Y. 1977); *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 425 F.Supp. 665, 668 (S.D.N.Y. 1977).

Not only did the district court, therefore, erroneously consider this factor on its presumption alone, but as a practical matter the presumed testimony is without importance. Respondents entirely failed to introduce any evidence below as to the substance and hence, importance of their possible testimony. Respondents alleged in their Complaint that they turned their horse over to a trainer in Florida. This alone throws serious doubt upon whether they could testify as to the horse's condition, training and health which together determine its market value.

As a matter of law, respondents' testimony as to damages should not have been given any weight by the district

[6] Citizenship/residence of a party may be relevant to the statutory criteria of "convenience of the parties". However, as discussed at pages 13 to 14, *infra*, the convenience of the parties strongly favored transfer to Florida.

court on the evidence adduced. It has been held that the convenience of liability witnesses must be afforded greater weight than that of damage witnesses. *Schulof* v. *Westinghouse Electric Corp.*, 402 F.Supp. 1262 (S.D.N.Y. 1975). For, as the court in *Schulof* pointed out:

> [S]ince the trial of liability *must* occur, while that of damages may or may not, the balance tips in favor of the convenience of the witnesses whose testimony will be necessary beyond question.

402 F.Supp. at 1264.

Based on the evidence adduced below, all of the liability witnesses, all of whom were identified and whose testimony was outlined, are either permanent or winter residents of Florida. All of these witnesses are non-parties and the district court below will have no subpoena power over them. Even if they appear voluntarily in New York, their expenses would be very great. Such factors have been cited as important by courts in considering transfer motions: *Vencedor Manufacturing Co., Inc.* v. *Gougler-Industries, Inc.*, 557 F.2d 886 (1st Cir. 1977); *McCrystal* v. *Barnwell County, S.C.*, 422 F.Supp. 219 (S.D.N.Y. 1976); *First National City Bank* v. *Nanz, Inc.*, 437 F.Supp. 184 (S.D.N.Y. 1975).

The district court ignored these factors. Thus, the district court relied on two incorrect bases in deciding the transfer motion. A review of the statutory and judicially recognized criteria clearly reveals that the transfer should have been ordered. Under these circumstances, had the Court of Appeals reviewed the transfer motion, discarded the incorrect bases, and compelled the district court to consider the proper criteria, a transfer would have been ordered.

b. *Application of the proper criteria would result in transfer.*

The transfer statute, and the judicial interpretation of it, provide the only correct bases for evaluating a transfer motion. *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964).

28 U.S.C. §1404(a) states:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Thus, the statute lists the three appropriate criteria: (1) convenience of the parties; (2) convenience of the witnesses; (3) the interest of justice. These broad criteria have been refined by courts into a large number of smaller factors or components.

Recently in *Car Freshner Corp.* v. *Auto Aid Manufacturing Corp.*, 438 F.Supp. 82 (N.D.N.Y. 1977), the court identified most of the factors recognized by courts as relevant to the 28 U.S.C. §1404(a) determination. The court stated:

> Among the factors which must be weighed by a court in deciding a motion under Section 1404(a) are: (1) convenience of the parties; (2) convenience of fact witnesses; (3) availability of process to compel presence of reluctant witnesses; (4) the cost of obtaining the presence of witnesses; (5) the access to proof; (6) calendar congestion; (7) where the relevant events took place; and (8) the interests of justice in general [citations omitted] . . .

438 F.Supp. at 85. With the exception of number 6 above, as to which no evidence was adduced below, all of the above factors favor transfer to Florida.

In *Delay & Daniels, Inc.* v. *Allen M. Campbell Co.*, 71 F.R.D. 368 (D.S.C. 1976), the court defined "convenience of the parties" in terms of three things the courts have looked to:

> The factors considered by the court when giving effect to the first criteria—convenience of the parties—include (1) the contact or lack of contact which the parties have with alternate forums; (2) the location of parties and employees of parties who will be examined before trial or called as witnesses; and (3) the location of documents which might be used or produced by the parties before or at the trial.

71 F.R.D. at 371-72.

Both parties in this case have substantial contact with the Middle District of Florida. Respondents kept their horse there—the destroyed property for which recovery is sought. Petitioner maintains a temporary residence in Florida for approximately half of each year. Petitioner keeps and maintains his horses in Florida. The training of the horses in question, allegedly owned by respondents and petitioner, was conducted in Florida.

Parties and employees who might be called to testify (all of whom can be found in Florida, not New York) are: (1) petitioner; (2) Shayne Barr[7] (who was driving "Bajan" at the time of the incident); (3) James Miller, petitioner's trainer; (4) Samuel Lewis, respondents' trainer; and (5) respondents' driver. The only party or employee whose residence is in New York is one of the two respondents, Giacopelli.

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[7] Originally named as a defendant, Shayne Barr was dismissed because there is no jurisdiction over him in New York. This lack of personal jurisdiction over a defendant has been cited as an important factor to be considered on transfer. *Relf* v. *Gasch*, 511 F.2d 804 at 807-08 (D.C. Cir. 1975).

All relevant documents (ownership papers, training records, repair and maintenance records for the equipment, veterinary reports and track accident reports) are in Florida, not New York. Thus, Florida is far more convenient to all parties than is New York.

The second factor relevant to determining the transfer motion is "convenience of fact witnesses". The important witnesses to consider in this regard are the liability witnesses, rather than damage witnesses. *Schulof* v. *Westinghouse Electric Corp.,* 402 F.Supp. 1262 at 1264 (S.D.N.Y. 1975). In addition to the five witnesses listed above, at least three eyewitnesses (Gilliland, Holland and Baskin) have been located. Gilliland and Holland are permanent residents of Florida and Baskin maintains residences in both Florida and Canada. Lastly, the employees of Stockman Harness Supply Company who maintained and repaired the allegedly defective harness are residents of Florida. Thus, the second factor is also heavily weighted in favor of transfer.

The third factor is the availability of process to compel reluctant witnesses. With the exception of the parties, the district court below cannot compel the presence of any of the above witnesses. On the other hand, the District Court for the Middle District of Florida could compel the attendance of everyone heretofore listed. See *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 502 at 511 (1947).

The fourth factor is the cost of obtaining witnesses. Since almost every conceivable witness in this case is in Florida, trial in New York obviously would result in a substantial cost to both parties. The comment of the district court below that those involved in horse racing are used to being peripatetic is hardly applicable to many of the witnesses who either live or maintain and repair equip-

ment in Florida. Since the presence of all of the non-party witnesses cannot be compelled in New York, substantial expenses necessarily will be incurred in attempting to obtain their testimony voluntarily. Even as to the employees of the parties, substantial expense will be necessary to have them present to testify at trial.

The fifth factor listed was access to proof. As was pointed out in discussing the first factor, *supra* at page 14 many documents that will be relevant to this case are in Florida. In addition, if the parties need to establish custom and usage at the racetrack where the accident occurred, track officials will be needed. Again, they are in Florida, not New York. With regard to the access to proof, it may become desirable or necessary to visit the track itself. *Gulf Oil, supra,* at 508. Thus, it can be seen that the access to proof overwhelmingly favors the Middle District of Florida over New York which is remote from all sources of proof in this case.

The seventh factor is "where the relevant events took place". All of the alleged acts of negligence took place in Florida. All of the damage or injury to property took place in Florida. The accident took place in Florida. The allegedly defective equipment was purchased, maintained and repaired in Florida. Both the horses involved were trained and quartered in Florida. In short, all of the relevant events took place in Florida. See e.g. *Bridgman* v. *Bradshaw,* 405 F.Supp. 1004, 1007 (D.S.C. 1975) and *Transcontinental Service Corp.* v. *True Temper Corp.,* 319 F. Supp. 920 (S.D.N.Y. 1970).

In interpreting the eighth factor—the interests of justice—the courts have looked to two criteria. First, the courts have sought to have the court sitting in the state, whose law will be applied, apply their own law. *Van Dusen*

v. *Barrack*, 376 U.S. 612 (1964); *Gulf Oil, supra* at 509. There can be no question here, that Florida law will apply, since the place of injury and negligence are all the same. Thus, a Florida federal court is preferable. See *Vaughn* v. *American Basketball Association*, 419 F.Supp. 1274, 1278 (S.D.N.Y. 1976).

The other criterion courts have used in determining the interests of justice is whether the locality of the trial is interested in or related to the litigation. As the Court said in *Gulf Oil, supra,*

> The facts of public interest also have place in applying the doctrine . . . Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation . . . There is a local interest in having localized controversies decided at home.

330 U.S. at 508-09. See also, *Vaughn* v. *American Basketball Association, supra* at 1278-79.

Clearly, a Florida jury has more interest in how racing and training are performed in Florida at a city owned racetrack—and, therefore, in accidents that occur in the course thereof—than does a New York jury. As can be seen, the eighth factor also comes down heavily on the side of transfer.

Thus, all of the statutory criteria and the judicially recognized factors relevant to a §1404(a) transfer motion favor the choice of Florida. It is submitted that the district court ignored all of the above factors and the statutory criteria favoring transfer. Had the Court of Appeals properly exercised its mandamus authority to direct the trial court to consider the relevant statutory criteria, as stated in *Platt* v. *Minnesota Mining & Manufacturing,*

376 U.S. 240, 245 (1964), there is no doubt that the district court would have been compelled to transfer this case to Florida. The Court of Appeals ought to have reviewed the action of the district court in order "to compel it to exercise its authority" to transfer this case since there is no question that, under the facts and law, it was the district court's "duty to do so".

2. The Court should grant the writ because there is considerable confusion in the Circuits regarding the proper standard for reviewing 28 U.S.C. §1404(a) transfer decisions.[8] The standard for reviewing transfer decisions is obviously a very important matter of federal procedure and the Court, in the exercise of its supervisory function, should make this standard clear and uniform.

The First Circuit's decision of *In re Josephson,* 218 F.2d 174 (1st Cir. 1954) stated:

> No doubt upon occasion a district court within this Circuit may make an error of judgment in transferring a case to a district outside the circuit. So, too, a district court outside our circuit may on occasion make a similar error . . . We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment.

218 F.2d at 182. Associating itself with the Third Circuit decision in *All State Freight, Inc.* v. *Moderelli,* 196 F.2d

[8] Petitioner refrains from calling this a conflict among the Circuits, although courts have called it one. *Kasey* v. *Molybdenum Corporation of America,* 408 F.2d 16 (9th Cir. 1969). Petitioner is reticent mainly because of the absence of a written opinion below. However, under the facts of this case, it is submitted that the Second Circuit is joining the ranks of the First and Third Circuits in refusing to review the district court's discretion under any standard. The Ninth Circuit will review such contentions only where there are allegations that the district court acted unlawfully.

1010 (3d Cir. 1952), the First Circuit quoted with approval, the following standard:

> We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon . . .

218 F.2d at 182. The First Circuit then held:

> Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold . . .

218 F.2d 174. This "really extraordinary situations" test, excluding review where the district court purports to weigh the statutory criteria, is still current law in the First Circuit. *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir. 1977).

The Third Circuit has developed a dichotomy among transfer motions for the purposes of review. In *Solomon* v. *Continental American Life Insurance Co.*, 472 F.2d 1043 (3d Cir. 1973) the court held:

> The transfer may be ordered (1) "[f]or the convenience of the parties and witnesses, in the interest of justice", but only (2) "to any other district or division where it might have been brought". In making determination (1) the district court is vested with a large discretion. In making determination (2) the district court has a much narrower discretion, if indeed any exists.

472 F.2d at 1045.

In reiterating *All States Freight* v. *Modarelli*, 196 F.2d 1010 (3d Cir. 1952), the Third Circuit has repeatedly in-

dicated that it will not "control the exercise of the district court's discretion by mandamus".[9] 472 F.2d at 1045. Rather, the court has stated "that the extraordinary writs will issue only where the trial court exceeded its authority or acted outside its jurisdiction". 472 F.2d at 1045. Thus, both the First and Third Circuits will not review a transfer order, no matter how glaring an abuse of discretion is involved, unless the district court acted unlawfully or outside its jurisdiction.

The Fourth Circuit has adopted a standard for reviewing transfer decisions by mandamus. It will issue mandamus to review a transfer order if the decision involves a "clear abuse of discretion". *Elliott Machine Corp.* v. *Modern Welding Company, Inc.*, 502 F.2d 178, 181 n.4 (4th Cir. 1974). *Morehead* v. *Barksdale*, 263 F.2d 117 (4th Cir. 1959).

The Fifth Circuit has adopted a similar "clear abuse of discretion" standard. *Ex parte Blaski*, 245 F.2d 737 (5th Cir.) *cert. denied*, 355 U.S. 872 (1957); *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720 (5th Cir. 1955); *Garner* v. *Wolfinbarger*, 433 F.2d 117 (5th Cir. 1970). However, the Fifth Circuit has also used 28 U.S.C. §1292(b) to review transfer orders. In *Garner* v. *Wolfinbarger*, 433 F.2d at 120, the Fifth Circuit held §1292(b) review unavailable for abuse of discretion review of transfer orders.

The Sixth Circuit has articulated the following standard:

> The power conferred on the Courts by Congress in the All Writs Act is meant to be used only in the

[9] The test used is almost mechanical in that the Court checks only to determine whether the district court mentions the statutory criteria. Thus, in *Solomon*, the Third Circuit specifically requested that district courts, in their opinions, list the factors considered. 472 F.2d at 1048. In this case, other than a mention of "statutory crietria", the court below did not mention or consider the statutory criteria.

> exceptional case where there is a clear abuse of discretion or usurpation of judicial power.

Lemon v. *Druffel*, 253 F.2d 680 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *Johnson & Johnson* v. *Picard*, 282 F.2d 386 (6th Cir. 1960).

The standard adopted by the Seventh Circuit was stated originally in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 220 F.2d 299 (7th Cir.) *cert. denied*, 350 U.S. 822 (1955):

> The balance of convenience of the parties is so overwhelming in favor of the defendant that we hold denial by respondent of the motion to transfer the case to the Southern District of Iowa was so clearly erroneous that it amounted to an abuse of discretion.

220 F.2d at 305. In *Sypert* v. *Miner*, 266 F.2d 196 (7th Cir.) *cert. denied*, 361 U.S. 832 (1959), the court modified its position slightly:

> We emphasized that an abuse of discretion must clearly appear . . . Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion.

266 F.2d at 199. Thus, the Seventh Circuit will review transfer cases where there is a "strong case of abuse of discretion".

While the Eighth Circuit originally adhered to the rule used in the First and Third Circuits, that mandamus was available only where the district court acted unlawfully (transferring a case to a jurisdiction where it could not have been brought),[10] the Eighth Circuit will now review

[10] *Great Northern Ry.* v. *Hyde*, 238 F.2d 852 (8th Cir. 1956), *adhered to by an equally divided court on rehearing*, 245 F.2d 537 (8th Cir.) *cert. denied*, 355 U.S. 872 (1957).

the court's exercise of discretion to see "whether the district court's action under §1404(a) was shown to be without any basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility". *McGraw Edison Co.* v. *Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965). This decision has recently been recognized in *Toro Co.* v. *Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) and *Caleshu* v. *Wangelin*, 549 F.2d 93, 96 (8th Cir. 1977). Perhaps because of the murkiness of this standard, the court in *Toro* concluded:

> And we are also satisfied that the action taken by the district court was not so impermissible, unreasonable or arbitrary as to call upon us to disturb it in this proceeding.

565 F.2d at 1001.

The Ninth Circuit has held that "Mandamus will lie to review a clearly erroneous transfer order under Section 1404(a)". *Commercial Lighting Products, Inc.* v. *U. S. District Court*, 537 F.2d 1078 (9th Cir. 1976). This was also the standard set out in *Pacific Car & Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968). In *American Fidelity Fire Ins.* v. *U. S. District Court*, 538 F.2d 1371 (9th Cir. 1976), the court stated that the standard in *Pacific Car* had been explicitly limited by *Kasey* v. *Molybdenum Corporation of America*, 408 F.2d 16 (9th Cir. 1969).

The Ninth Circuit appears now to have adopted the standard of the First and Third Circuits with regard to reviewing transfer orders where "a district court has reached a well-reasoned decision on the basis of evaluating the issues listed in section 1404(a)". *American Fidelity Fire Ins.* v. *U. S. District Court*, 538 F.2d at 1376 n.2 (9th Cir. 1976). However, where it appears that the judge has ignored the statute or acted unlawfully, review is allowed.

Kasey v. *Molybdenum Corp. of America,* 408 F.2d 16 (9th Cir. 1969)

The Tenth Circuit applies a rule similar to that used by the Fourth, Fifth, Sixth, Seventh, Eighth and D.C. Circuits:

> The transfer lies within the sound discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion.

Texas Eastern Transmission Corp. v. *Marine Office-Appleton & Cox Corp.,* 579 F.2d 561, 567 (10th Cir. 1978). *Texas Gulf Sulphur Co.* v. *Ritter,* 371 F.2d 145, 147 (10th Cir. 1967).

The Court of Appeals for the District of Columbia Circuit has adopted the clear abuse of discretion standard "to correct the disposition of a transfer motion by the District Court, even where the District Court has purported to consider the proper factors". *Fine* v. *McGuire,* 433 F.2d 499 (D.C. Cir. 1970). See also: *Relf* v. *Gasch,* 511 F.2d 804 (D.C. 1975) and *Starnes* v. *McGuire,* 512 F.2d 918 (D.C. Cir. *en banc* 1974).

A review of the above authorities indicates that the law with regard to reviewing transfer orders is, at best, uncertain and non-uniform. In a very general sense, the First, Second, Third, and Ninth Circuits will not review the trial court's exercise of its discretion on a transfer motion so long as the district court purports to consider proper factors and does not act unlawfully. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits will review that exercise of discretion. However, even among these latter courts, the actual standard used varies among the following: (1) "clear abuse of discretion" (Fourth, Fifth, Tenth and District of Columbia

Circuits); (2) "clear abuse of discretion or usurpation of judicial power" (Sixth Circuit); (3) "so clearly erroneous so as to amount to an abuse of discretion" (Seventh Circuit); (4) "without any basis for judgment of discretion, so as to involve abuse of judicial power and responsibility" (Eighth Circuit); and (5) "clearly erroneous" (Ninth Circuit).

It is respectfully submitted that differing standards for review will cause conflicting results where the same criteria exist. It is an unfortunate situation where the outcome of a litigant's case on venue is decided by the fact of where the opposing litigant brought suit. Here the Second Circuit has refused to review the order denying transfer below in such an extreme factual setting that any one of seven other Circuits apparently would review that order.

There is no question that transfer under 28 U.S.C. §1404(a) is an important asset for the federal courts. At least three times the Court has granted certiorari to articulate the criteria and meaning of the statute. The Circuits, however, have not been able to arrive at a consensus as to the standard of review nor have their positions become so static as to be predictable. The Eighth and District of Columbia Circuits have liberalized their standard of review over time. On the other hand, the Ninth and now the Second Circuit have apparently limited their standards for reviewing transfer decisions. In short, the Courts of Appeal seem hopelessly unpredictable as to the appropriate standard for reviewing transfer decisions. Only the Court can render the standard definite and uniform throughout the Circuits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case, as prayed herein.

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
Melville T. Barr
1251 Avenue of the Americas
New York, New York 10020

Of Counsel:

CONDON & FORSYTH
NATHANIEL F. KNAPPEN

Certificate of Service

I hereby certify that I have, this 15th day of August, 1979, served the foregoing petition for a writ of certiorari upon respondents by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, N.Y. 10020, with first class postage prepaid, addressed to Sterenfeld & Sterenfeld, counsel of record for respondents, at 299 Broadway, Suite 410, New York, N.Y. 10007.

August 15, 1979

.....

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

APPENDIX.

Order Denying Petition

(Filed May 18, 1979)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of May, one thousand nine hundred and seventy-nine.

In Re:

MELVILLE T. BARR,

Petitioner.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, Melville T. Barr, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

Order Denying Petition for Rehearing

(Filed May 18, 1979)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of April, one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN
HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges.

In Re:

MELVILLE T. BARR,
Petitioner.

A petition for a rehearing having been filed herein by counsel for the petitioner, Melville T. Barr,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order Denying Petition

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 78-3049

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of March, one thousand nine hundred and seventy-nine.

Present:

HONORABLE STERRY R. WATERMAN
HONORABLE WALTER R. MANSFIELD
HONORABLE WILLIAM H. TIMBERS,
Circuit Judges.

In Re MELVILLE T. BARR,
Petitioner.

Petition for writ of mandamus having been filed, together with a motion for a stay, which was granted pending receipt of a reply from the Respondents, and the Court having considered the petition and response, the petition is hereby denied.

/s/ STERRY R. WATERMAN
Sterry R. Waterman
U.S.C.J.

/s/ WALTER R. MANSFIELD
Walter R. Mansfield
U.S.C.J.

/s/ WILLIAM H. TIMBERS
William H. Timbers
U.S.C.J.

Memorandum and Order

(Filed August 15, 1978)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

78 C 646

MICHAEL GIACOPELLI and STEPHEN DEMAS,

Plaintiffs,

—against—

MELVILLE T. BARR d/b/a BARR M. STABLE & SHAYNE BARR,

Defendants.

STERENFELD & STERENFELD
New York, New York
(Herbert W. Sterenfeld, Esq.,
Stephen B. Roberts, Esq., of counsel)
for plaintiffs

CONDON & FORSYTH
New York, New York
(George N. Tompkins, Jr., Esq.,
Marshall S. Turner, Esq., of counsel)
for defendants

NICKERSON, *District Judge*

Plaintiffs, residents of New York and New Jersey, bring this action against two citizens of Canada. The complaint alleges that defendant Melville T. Barr was and is a duly

licensed owner of race horses, having been licensed by the New York State Racing and Wagering Board, and that he was and is conducting the business of racing horses within this state. Defendant Shayne Barr is alleged to have been in Melville Barr's employ as a groom. On March 20, 1978 in Orlando, Florida, the horse "Bajan", owned by Melville Barr and driven by Shayne Barr, ran into the horse "Calumet" owned by the plaintiffs. As a result of the collision both horses suffered serious injuries and later died. Plaintiffs claim that defendants were negligent.

Defendants moved to dismiss the complaint on the grounds that (1) the court lacks personal jurisdiction over defendants, (2) defendants have not been properly served with process, and alternatively (3) this district is an inconvenient forum so that the action should be transferred to the middle district of Florida.

Defendant Melville Barr has submitted an affidavit stating in substance that he does not own race horses or do business in the State of New York. He admits that he is one of five shareholders of Melville T. Barr Investment Ltd., a Canadian corporation which does business as Barr-M-Stable in the State of New York, among other places. He claims that his only interest in horses which race in the State of New York is as president and shareholder of the Canadian corporation.

However, in an application to the New York State Racing and Wagering Board for a license for the year 1977 Melville Barr stated that he personally owned several race horses. He left blank that part of the printed application for a license which requires the applicant to list the name and address of any corporation, its officers, directors and stockholders, where the corporation owns horses in which

the applicant has an interest. He now claims that it was a mistake for him to fill out the form in the fashion which he did. However, it is conceded that he comes to New York when the Barr-M-Stable horses run here.

It appears to the court that defendant has manifested sufficient activity in this state to subject him to process here under New York Civil Practice Law and Rules §302(a).

Nothing in the papers indicates that defendant Shayne Barr has been or is transacting business in New York. Personal jurisdiction has therefore not been acquired over him, and he should be dismissed from the action.

Defendant Melville T. Barr also contends that service of process was improper as to him because it failed to comply with the method of service prescribed by CPLR §308. Service was attempted by delivery of a copy of the summons and complaint to defendant Shayne Barr in Florida, but a copy of the summons and complaint was apparently never mailed to defendant Melville Barr's last known residence. The service was therefore inadequate. However, this should not result in dismissal of the action. Proper service will have to be made on him.

Defendants have also moved alternatively to have the case transferred to the middle district of Florida pursuant to 28 U.S.C. §1404(a). It is true that the alleged accident happened in Orlando, Florida, and some witnesses resident there may testify. However, New York is closer to Canada, the residence of Melville and Shayne Barr, than is Orlando, Florida. Moreover, presumably important proof as to the value of plaintiffs' horse will be required. Witnesses who can testify to this presumably include the plaintiffs. People who are in the business of racing horses must of necessity be peripatetic, and it hardly seems a

greater burden to defendants to come to New York than to come to Florida. Under the circumstances plaintiffs' choice of forum will not be disturbed. The motion to transfer is denied. So ordered.

Dated: Brooklyn, New York
August 14, 1978

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson
U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve them upon the parties.

Amended Memorandum and Order

(Filed Sept. 20, 1978)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

78 C 646

MICHAEL GIACOPELLI and STEPHEN DEMAS,

Plaintiffs,

—against—

MELVILLE T. BARR d/b/a BARR M. STABLE & SHAYNE BARR,

Defendants.

STERENFELD & STERENFELD
New York, New York
(Herbert W. Sterenfeld, Esq.,
Stephen B. Roberts, Esq., of counsel)
for plaintiffs

CONDON & FORSYTH
New York, New York
(George N. Tompkins, Jr., Esq.,
Marshall S. Turner, Esq., of counsel)
for defendants

NICKERSON, *District Judge*

Defendant Melville T. Barr has moved, pursuant to General Rule 9(m) of the United States District Court for

the Eastern District of New York and Rule 60 of the Federal Rules of Civil Procedure, for amendment of the Order of this court filed August 15, 1978. That Order found personal jurisdiction over defendant under New York Civil Practice Law and Rules §302(a).

It has been pointed out, both in defendant's memoranda of law in support of the original motion to dismiss and in defendant's memorandum of law in support of the motion for reargument, that the New York "long-arm statute" (CPLR §302(a)) is inapposite to the facts of this case inasmuch as it applies only "to a cause of action arising from any of the acts enumerated" in the section. Since plaintiff's cause of action did not arise from conduct occurring within the State of New York, and plaintiff did not suffer an "injury . . . within the state" within the intendment of the statute, the point is well taken. Insofar as the Order of August 15 was premised on §302(a) it was incorrect.

Nevertheless, it appears to the court that defendant Melville T. Barr's activities in this state are sufficient to subject him to personal jurisdiction under CPLR §301. Defendant's affidavits to the contrary notwithstanding, his application to the New York State Racing and Wagering Board stated that he *personally* owned several race horses which race in New York. He left blank that portion of the application which requires an applicant to list any corporation that owns horses in which the applicant has an interest.

Given these facts, the question of defendant's physical presence in New York is of little importance. His substantial business activities within the State of New York provide the requisite contacts to establish personal jurisdiction under CPLR §301.

Defendant Melville T. Barr has also moved for amendment of the Order of August 15 denying defendant's motion to transfer the case to the Middle District of Florida pursuant to 28 U.S.C. §1404(a). It is clear that the burden is on defendant to establish why there should be a change of forum. Having examined the papers submitted with regard to this motion and considered all of the arguments in light of the pertinent statutory criteria, it is the opinion of this court that the facts of this case do not warrant transfer. The motion to transfer is denied.

Finally, defendant's motion for certification under 28 U.S.C. §1292(b) so that defendant may apply to the United States Court of Appeals for the Second Circuit for leave to appeal from this Order is denied. So ordered.

Dated: Brooklyn, New York
September 19, 1978

/s/ EUGENE H. NICKERSON
Eugene H. Nickerson, U.S.D.J.

The Clerk shall make copies of this Amended Memorandum and Order and serve them upon the parties.